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SUPREME COURT, U.S.
FILED
DEC 16 1994
OFFICE OF THE CLERK

No. 94-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN LILBURN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITIONER'S REPLY BRIEF

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December 1994

CASILLAS PRESS INC., 1717 K STREET, N.W. WASHINGTON, D.C. 20036

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I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT IN THE LOWER COURTS REGARDING THE COMPATIBILITY OF "HUNTER HARASSMENT" LAWS WITH THE EXERCISE OF FIRST AMENDMENT RIGHTS.

Respondent acknowledges the "widespread enactment over the past ten years of hunter harassment laws throughout the country" (Opp. 10), and also that various lower courts have split regarding the consistency of these laws with First Amendment priniciples (Opp. 7-10). Nevertheless, the State insists that review is not appropriate because the "lower court decisions . . . involve statutory provisions which differ in material ways from the Montana law at issue in this case . . . ."

(Opp. 7). This argument does not afford a basis for denying the petition for several reasons.

First, whatever the differences between various "hunter harassment" statutes, respondent itself concedes that there is "tension" between the lower courts as to how the constituitonality of these laws should be analyzed (Opp. 8). Indeed, the State even finds it necessary to maintain that the Second Circuit's "analysis of the First Amendment issues presented is clearly wrong" — particularly that court's critical finding that the Connecticut hunter harassment statute was content-based because it was aimed at those opposed to sport hunting. Opp. 9, *citing Dorman v. Satti*, 862 F.2d 432 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989). That attack on the Second Circuit's reasoning — whether valid or not — is tantamount to a concession that there is indeed an irreconcilable conflict between the Second Circuit's approach and that pursued by the Montana Supreme Court here.

Second, to the extent that there are any "material" differences between the statutes considered by the lower courts, those differences do not strengthen respondent's position. As discussed previously, if anything, the hunter harassment provisions invalidated by the Second Circuit and the Idaho Supreme Court (and declared to be objectionable by the New Hampshire Supreme Court) were *less* constitutionally suspect than the law at issue.

Indeed, as respondent acknowledges, the Idaho Supreme Court struck down a hunter harassment prohibition — although it was *not* deemed to be content-based — because the "Idaho statute could be violated by someone who 'might enter an area where wildlife could be legally hunted and do nothing more than announce his opposition to hunting and his intention to interfere with such taking.' " Opp. 9 (emphasis added), *quoting State v. Casey*, 876 P.2d 138, 140 (Idaho 1994).

The statute at issue here, however, sweeps even more broadly — it criminalizes *any* conduct or speech which merely "disturb[s] an individual engaged" in hunting, trapping, or "pursuing" a wild animal — and suffers the added constitutional infirmity of being explicitly viewpoint-based, *i.e.*, by targeting "disturbing" speech or conduct that is made with the "intent to dissuade."

In short, there is simply no coherent way in which the Montana Supreme Court's ruling can be reconciled with that of the Idaho Supreme Court or any of the other courts which have perceived First Amendment flaws in hunter harassment laws. Far from "arriving at a level of consensus with respect to the federal law issues involve[d]," as alleged by respondent (Opp. 10), the lower courts are in fundamental disgreement regarding the constitutionality of "hunter harassment" prohibitions. Therefore, guidance by this Corut on the federal constitutional questions involved is appropriate.

II. THE MONTANA SUPREME COURT'S RULING RAISES IMPORTANT FIRST AMENDMENT QUESTIONS THAT WARRANT REVIEW

Respondent asserts that review is improper because the State of Montana enacted a "non-content based" statute which is designed essentially to prevent physical "interference with lawful hunting activities . . .." (Opp. 6). However, as even a cursory review of the statute discloses, that argument is disingenuous.

Thus, while one subsection of Montana's hunter harassment law *does* provide that "[n]o person may intentionally interfere with the lawful taking of a wild animal by another," MCA § 87-3-142(1), that is *not* the subsection under which petitioner was charged and convicted. Rather, *in addition to* prohibiting

"intentional interverence with the lawful taking of a wild animal," *id.*, the Montana Legislature *also* made it an offense to "*disturb* an individual" engaged in hunting or trapping activities "with *intent to dissuade*" the individual from "taking" the animal. MCA § 87-3-142(3) (emphasis added).

This additional prohibition — which was invoked against petitioner here — furthers no independent, legitimate interest of the State. Thus, as respondent tacitly concedes, the provision's only incremental effect is to criminalize speech and expressive conduct that do *not* rise to the level of actual physical "interference" but, rather, merely "disturb" persons engaging in hunting and trapping by exposing them to " 'verbal criticism and challenge.' " Opp. 18, *quoting City of Houston v. Hill*, 482 U.S. 451, 461 (1987). Under respondent's own analysis, therefore, it is evident that the provision's "potential unconstitutional applications" are indeed "substantial" when "judged in relation to the statute's . . . legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see also Texas v. Johnson*, 491 U.S. 397, 410 (1989) (Texas statute forbidding desecration of the flag was not necessary to keep the peace because the state "already has a statute specifically prohibiting breaches of the peace.").[1]

[1]Respondent's rebuttal to petitioner's overbreadth argument is also based on a flagrant misreading of the statute. As noted, respondent acknowledges that the provision may criminalize " 'challenge and criticism' " directed at hunters, Opp. 17, *quoting City of Houston v. Hill, supra*, 482 U.S. at 461, but asserts that the provision only "prohibit[s] such 'challenge and criticism' . . . in those circumstances when it actually and *intentionally disturbs a hunt.*" Opp. 17 (emphasis added). But that is not what the law says; rather, as acknowledged by the Montana Supreme Court, the statute proscribes any " 'disturbance' *of a hunter* . . . when it is done with the intent to either *dissuade the hunter or to prevent the taking of the animal.*" App. 13a (emphasis added). Obviously, the overwhelming majority of speech and expressive conduct by groups and individuals opposed to hunting is likely to be "disturbing" to hunters, and hence the statute "significantly compromise[s] recognized First Amendment protections of parties not before the Court . . . ." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

Defendants' arguments as to why the provision is not content-based are also without merit. Contradicting the Montana Supreme Court's reasoning — which focused exclusively on the purported "governmental purpose" underlying the provision, App. 12a — respondent concedes that, irrespective of its underlying motivation, a "statute may be found content-based if it *facially discriminates* against speech of a certain content . . .." Opp. 13 (emphasis added). Yet, remarkably, the State insists that a provision which selectively singles out for punishment speech or expressive conduct that is "disturb[ing]" to hunters when accompanied by the "intent to dissuade" them is not, on its face, content-based. *Id.*[2]

That position simply cannot be reconciled with this Court's recent precedents, which confirm that the "First Amendment does not permit [a] governmental entity to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V. v. St. Paul,* 112 S. Ct. 2538, 2547 (1992). Indeed, while asserting that the "applicability of the statute does not depend on the ***kind*** of expressive conduct in which the defendant engaged" (Opp. 12) (emphasis added), respond-

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[2]Petitioner does not "concede . . . that the Montana Supreme Court accurately found that the legislature's intent . . . was not to suppress speech . . .." Opp. 13. To the contrary, in view of its simultaneous adoption of a sweeping prohibition on "intentional interference" with hunting and trapping, the Montana legislature's only conceivable purpose in further proscribing conduct and speech that "disturbs" hunters and is accompanied by the "intent to dissuade," was to suppress speech by persons who, to use respondent's characterization, have a "philosophical opposition to hunting." Opp. 12. In particular, contrary to the respondent's assertion, there is no evidence in the record that the legislature was concerned with preventing hunters improperly from taking animals from each other. *Id.* In any event, there is no need for the Court to even attempt to fathom the Montana legislature's underlying intent since the provision at issue "on its face[] discriminates based on content." *Turner Broadcasting System Inc. v. Federal Communications Commission,* 114 S. Ct. 2445, 2459 (1994).

ent does not and cannot deny that the provision under which Mr. Lilburn was convicted may not, as written, be applied to persons who engage in speech and expressive conduct — no matter how disruptive — with the objective of *encouraging* a hunter to kill an animal.

Thus, under the Montana law, a pro-hunting group may hold up signs in a national forest virulently attacking persons opposed to hunting on environmental or ethical grounds, yet an animal protection or conservation group would be prohibited from holding up a sign of identical size with the opposite message, so long as it had the effect of "disturbing" hunters. Plainly, however, Montana "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." *R.A.V, supra,* 112 S. Ct. at 2548.[3]

[3]The State's reliance on *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993), is misplaced and simply highlights why review is appropriate here. *Mitchell* did not involve a statute that proscribed the expression of one particular viewpoint on a question of public policy but, rather, merely authorized an enhanced penalty when *an otherwise illegal act* was undertaken with a race-based motive. Distinguishing the statute involved in *R.A.V.* — which was "explicitly directed at expression" — the Court concluded that the enhancement provision "is aimed at conduct unprotected by the First Amendment." *Id.* at 2201. Here, of course, the state concedes that it has adopted a statute which criminalizes speech and conduct that is "disturb[ing]" to persons engaged in hunting and trapping (Opp. 18 n. 11), and hence this law suffers from similar constitutional defects to the one invalidated in *R.A.V.*, but bears no resemblance to the penalty-enhancement provision sustained in *Mitchell*.

CONCLUSION

For the foregoing reasons, as well as those set forth previously, the petition should be granted.

Respectfully submitted,

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